IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 461 of 1992

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT

and

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

JAYANTIBHAI DAHYABHAI MAHERA

Versus

STATE OF GUJARAT

Appearance:

MS BANNA S DUTTA for Appellant

MR KT DAVE APP for Respondent No. 1

CORAM : MISS JUSTICE R.M.DOSHIT

and

MR.JUSTICE A.L.DAVE

Date of decision: 09/11/2000

ORAL JUDGEMENT (Per : MISS JUSTICE R.M.DOSHIT)

This appeal arises of the judgment and order dated 21st December, 1991, passed by the learned Additional Sessions Judge, Nadiad, in Sessions Case No. 87/91.

The appellant-accused was charged for an offence punishable under section 302 IPC. It was alleged that the appellant-accused had an illicit relationship with Jashiben the sister of the deceased Kalabhai. On 31st December, 1990, at around 15-00 minutes past midnight, the appellant entered the house of Kohyabhai Rathod. The said Kohyabhai suspected presence of the stranger in the house and believing it was a thief, raised an alarm. The deceased Kalabhai and the complainant Pratapbhai Kohyabhai the sons of Kohyabhai Rathod, who were living in the adjacent houses hearing the alarm raised by Kohyabhai, rushed to his house. The appellant at the time was running away from the house. The said Pratapbhai and the deceased Kalabhai caught hold of the appellant who was running away and a scuffle arose. The appellant took out a knife (Khanjar) and stabbed the deceased Kalabhai in the chest, and ran away from the scene of the offence. The deceased Kalabhai received injuries which resulted into his death on the spot. The learned trial Judge held the appellant guilty of offence punishable under section 302 IPC and sentenced him to suffer RI for life and imposed a fine of Rs.1000/-, and further RI for two months in default of payment of fine. The appellant was also charged for causing injury to the complainant-Pratapbhai Kohyabhai and was convicted of offence punishable under section 324 IPC, for which he was sentenced with RI for six months and a fine of Rs.250/- and further RI for one month was imposed in default of payment of fine. The substantive punishments are ordered to run concurrently. Feeling aggrieved, the appellant has preferred the present appeal.

Ms.Datta has submitted that the learned trial Judge has erred in holding the appellant guilty of offence punishable under section 302 IPC. She has also submitted that the learned trial Judge ought to have believed his defence of self-defence raised by the appellant. In the alternative, she has submitted that in any event, the appellant can not be said to have an intention to commit murder of the deceased Kalabhai. The accused had given one single blow to the deceased Kalabhai in the course of scuffle which arose while the

appellant was trying to run away from the house of Kohyabhai Rathod. The appellant, at the most, therefore, could have been convicted of an offence punishable under section 304 Part-II IPC. The order of sentence also requires to be modified accordingly. In support of her argument, she has relied upon the judgment of the Hon'ble Supreme Court in the matter of K. RAMKRISHNAN UNNITHAN VS STATE OF KERALA (AIR 1999, SC 1428).

The evidence of the complainant-Pratapbhai Kohyabhai (PW-2) supports the complaint (Ex-10). The complainant is also an eye witness to the incident. It is evident that the appellant had entered the house of Kohyabhai soon after the mid-night and since his presence in the house was detected, and Kohyabhai had raised an alarm, he tried to run away from the house. While he was running away from the house, he was restrained by the complainant-Pratapbhai and the deceased Kalabhai. In the ensuing scuffle, the appellant gave a knife blow to the deceased Kalabhai and ran away from the scene of the offence. The presence of the complainant-Pratapbhai Kohyabhai at the scene of the offence has been established by his evidence. The presence of the appellant also has been established by the evidence of Pratapbhai Kohyabhai (PW-2). It is also established that the death of the deceased Kalabhai was caused on account of the injury sustained by him by the knife blow given by the appellant. The offending weapon knife (Khanjar) was recovered at the instance of the appellant. The recovery panchnama (Ex-20) has been proved by the evidence of the Panch Vinubhai Ambalal (PW-8). Thus, it is undoubtedly, proved that the appellant had entered the house of Kohyabhai Rathod as alleged and had give a knife (Khanjar) blow to the deceased Kalabhai in the chest, which resulted into a fatal injury of which the deceased Kalabhai died instantaneously. The presence of blood at the scene of the offence, the clothes of the deceased Kalabhai, the clothes of the appellant and the offending knife has been proved and each of the blood samples has been found to be of the same person i.e. deceased Kalabhai. It should also be noticed that neither the deceased Kalabhai nor the complainant Pratapbhai was armed. In that view of the matter, it is not possible to believe the theory of self-defence putforth by the appellant. However, to us, it does appear that the appellant had no intention to commit murder of the deceased Kalabhai. It should be noted that the appellant had entered the house of Kohyabhai and not the deceased Kalabhai. It is not even suggested that the appellant had previous animosity with deceased Kalabhai. The

appellant seems to have used the weapon with a view to fleeing away from the scene of the incident while he was caught hold by the complainant Pratapbhai and the deceased Kalabhai. In our view, therefore, the conviction of the appellant under section 302 IPC is not sustainable. In the matter of K.Ramkrishnan Unnithan (supra), in a similar set of facts, the court found that the appellant had no animosity against the deceased and he was involved because of the altercation with PW-1. The court held - " It is difficult for us to hold that he gave the blow in question either with the intention of causing murder of the deceased or he can have said to have the requisite knowledge that the death would otherwise be the inevitable result. In such a situation, even on accepting the prosecution case, we hold that the accused did not commit the offence under section 302 but under Part-II of section 304 IPC ".

In view of the above discussion, the conviction of the appellant under section 302 IPC is quashed and set aside. The appellant is instead convicted under section 304 Part-II IPC. We are informed that the appellant is in jail since the date of the incident, and barring the few occasions when he was released on temporary bail, parole or furlough, he has served the entire period in jail. In the circumstances, we alter the sentence of rigorous imprisonment for life to the period actually undergone. The appellant is also sentenced to fine of Rs.6000/-, of which, a sum of Rs.5000/- shall be remitted to the family members of the deceased Kalabhai. In default of payment of fine, the appellant shall undergo RI for 15 days. The conviction and sentence under section 324 IPC is confirmed.

Appeal is partly allowed in the above terms. The muddamal articles be disposed
court.

(MS R.M.DOSHIT J)

(A.L.DAVE J)

JOSHI